

Pittman v. City of Aurora

Decided Oct 23, 2020

Civil Action No. 19-cv-01947-PAB-NRN

10-23-2020

TEDDY PITTMAN, Plaintiff, v. CITY OF AURORA, OFFICER KEVIN PALACIO, OFFICER DARIAN DASKO, OFFICER DANIEL VEITH, and OFFICER RYAN BURKE, Defendants.

N. REID NEUREITER United States Magistrate Judge

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTIONS TO DISMISS (DKT. ##90 & 93)

This case is before me pursuant to Orders (Dkt. ##91 & 94) issued by Chief Judge Philip A. Brimmer referring Defendant City of Aurora's (the "City") Motion to Dismiss Plaintiff's Second Amended Complaint and Jury Demand (Dkt. #90), and the Motion to Dismiss on Behalf of Defendants Palacio, Dasko, Veith, and Burke (the "Defendant Officers") (Dkt. #93). Plaintiff Teddy Pittman filed responses (Dkt. ##99 & 100), and the City and Defendant Officers filed replies (Dkt. ##102 & 104). On August 28, 2020, I heard argument on the subject motions (*see* Dkt. #107). I have taken judicial notice of the Court's file and considered the applicable Federal Rules of Civil Procedure *2 and case law. Now, being fully informed and for the reasons discussed below, I **RECOMMEND** that the subject motions be **DENIED**.

BACKGROUND

I. Procedural History

Proceeding pro se, Mr. Pittman initiated this lawsuit on July 5, 2019. Dkt. #1. Defendants collectively moved to dismiss (Dkt. #18) his Amended Complaint (Dkt. #7). After hearing argument on the motion (*see* Dkt. #48), I issued a Report and Recommendation (Dkt. #51) wherein I recommended, among other things, that Mr. Pittman's municipal liability claim against the City be dismissed because Mr. Pittman did not sufficiently demonstrate the existence of a municipal policy or custom, but that his [42 U.S.C. § 1983](#) claim proceed against the Officers Dasko, Veith, and Palacio (Officer Burke had not been yet been named as a party) for violating his Fourth Amendment right to be free from unreasonable searches and seizures during a traffic stop, along with another § 1983 claim against Defendant Dasko for violating the Equal Protection Clause. I then *sua sponte* entered an order appointing Mr. Pittman pro bono counsel (Dkt. #58). Attorney Kevin D. Homiak was appointed (Dkt. #60) and entered an appearance on behalf of Mr. Pittman (Dkt. #65). With leave of Court, Mr. Homiak filed a Second Amended Complaint and Jury Demand on May 15, 2020 (Dkt. #83), the filing of which rendered moot both the motion to dismiss and my Report and Recommendation (Dkt. #84). The subject motions to dismiss followed.

II. Mr. Pittman's Second Amended Complaint

3 *3

Unless otherwise noted, all allegations are taken from Mr. Pittman's Second Amended Complaint (Dkt. #83) and are presumed to be true for the purposes of these motions to dismiss.

a. The Traffic Stop

This lawsuit arises from a traffic stop that occurred on January 19, 2019 in Aurora, Colorado. After following Mr. Pittman for approximately 18 blocks, Aurora Police Officers Dasko and Veith pulled Mr. Pittman over as he was about to cross into the City of Denver. Mr. Pittman, who had been complying with all traffic laws and was "scared and confused," pulled over. Officer Dasko approached the vehicle and informed Mr. Pittman that he stopped him for a defective side headlamp, which Mr. Pittman knew was a pretext because his headlamps were functioning properly. Officers Burke and Palacio arrived on the scene while Officers Dasko and Veith ran Mr. Pittman's information, learning that while Mr. Pittman did not have any outstanding warrants or issues with his car registration, he did have a purported gang affiliation and a prior arrest from 2016. They determined that Mr. Pittman was a "code four," meaning that he was not going to receive a citation for the headlamp. Rather than letting him leave, however, Officer Dasko demanded that Mr. Pittman step out of the vehicle so he could be searched for weapons. Mr. Pittman refused as the other officers surrounded his car. Even though Officer Dasko, in the presence of the other officers, confirmed to Mr. Pittman that he was "code four," Mr. Pittman was told to step out because he was an "associated gang member." Upon Mr. Pittman's continued refusal to exit the vehicle, Officers Veith and Dasko grabbed and twisted Mr. Pittman's left arm and pulled him out of the car. Officer Dasko searched Mr. Pittman's person and found no evidence of a crime. Over Mr. *4 Pittman's objection, he then searched Mr. Pittman's vehicle, again finding nothing. This was all observed by Officers Veith, Palacio, and Burke, who were visibly armed and standing over Mr. Pittman while he sat on the curb.

About 40 minutes after he was pulled over, Mr. Pittman was allowed to leave. He was cited for the defective headlamp and for "failing to obey a lawful order." The criminal charges were later dismissed by Aurora Assistant City Attorneys Andrea Wood and George Koumantakis.

Mr. Pittman filed a complaint with the Aurora Police Department. Lieutenant Chad Cerinich determined that the Defendant Officers' actions were lawful, and that no disciplinary action, training, or additional supervision was necessary. Lieutenant Cerinich then wrote Aurora Deputy City Attorney Julie Heckman, the Chief of the Criminal Division, to advise her that he disagreed with the decision to dismiss the criminal charges against Mr. Pittman.

b. Allegations Regarding the City of Aurora

Mr. Pittman alleges that the City of Aurora "has a continuing, persistent, and widespread informal custom of unlawfully seizing and searching African Americans based on their arrest record and race." In support, he first points to the fact that he was stopped three months later by Aurora police officers under similar circumstances.¹ He also cites several other recent instances of unlawful searches and seizures involving African Americans based only on their race and arrest record, a practice which has *5 been condemned by the City's own attorneys but for which no Aurora police officers have been disciplined.

¹ This stop forms the basis of another lawsuit brought in this District. See *Pittman v. City of Aurora et al.*, 19-cv-02209-PAB-NRN (Colo. Dist.).

c. Mr. Pittman's Claims for Relief

Mr. Pittman asserts seven claims for relief pursuant to [42 U.S.C. § 1983](#).

- **Claim One** is a § 1983 claim brought against the Defendant Officers for unlawfully searching Mr. Pittman in violation of the Fourth Amendment.
- **Claim Two** is a § 1983 claim brought against the Defendant Officers for unlawfully searching Mr. Pittman's vehicle in violation of the Fourth Amendment.
- **Claim Three** is a § 1983 claim brought against Officers Veith and Dasko for unlawfully seizing him during the traffic stop in violation of the Fourth Amendment.
- **Claim Four** is a § 1983 claim brought against the Defendant Officers for wrongful detention under the Fourth Amendment.
- **Claim Five** is a § 1983 claim brought pursuant to the Equal Protection Clause of the Fourteenth Amendment against the Defendant Officers.
- **Claim Six** is § 1983 claim brought against the City of Aurora for its widespread custom and practice of violating the Fourth and Fourteenth Amendments.
- **Claim Seven** is a § 1983 claim brought against the City of Aurora for its deliberately indifferent training and supervision failures resulting in violations of the Fourth and Fourteenth Amendment.

6 *6

Defendants move to dismiss all of Mr. Pittman's claims for failure to state claims upon which relief can be granted.

LEGAL STANDARDS

I. Motion to Dismiss Under Rule 12(b)(6)

Rule 12(b)(6) provides that a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." [Fed. R. Civ. P. 12\(b\)\(6\)](#). "The court's function on a [Rule 12\(b\)\(6\)](#) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, [336 F.3d 1194, 1201](#) (10th Cir. 2003) (citations and quotation marks omitted).

"A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff." *Hall*, 935 F.2d at 1198. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, [556 U.S. 662, 678](#) (2009) (quoting *Bell Atlantic Corp. v. Twombly*, [550 U.S. 544, 570](#) (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pleaded facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The *Iqbal* evaluation requires two prongs of analysis. First, the court identifies "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id.* at 679-81. Second, the court considers the factual allegations "to determine if they plausibly suggest an entitlement to *7 relief." *Id.* at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id.* at 679.

7

However, the Court need not accept conclusory allegations without supporting factual averments. *Southern Disposal, Inc., v. Texas Waste*, 161 F.3d 1259, 1262 (10th Cir. 1998). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Moreover, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does the complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (citation omitted).

II. Qualified Immunity

The doctrine of qualified immunity protects government officials from individual liability in the course of performing their duties so long as their conduct does not violate clearly established constitutional or statutory rights. *Washington v. Unified Gov't of Wyandotte Cty.*, 847 F.3d 1192, 1197 (10th Cir. 2017). Once a defendant has asserted a defense of qualified immunity, the burden shifts to the plaintiff who must establish that (1) the defendant violated a right, and (2) the right was clearly established. *Puller v. Baca*, 781 F.3d 1190, 1196 (10th Cir. 2015). A right is clearly established "when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as the plaintiff maintains." *8 *Washington*, 847 F.3d at 1197 (quoting *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014) (internal quotation marks omitted)).

A qualified immunity defense may be asserted in a Rule 12(b)(6) motion, although a motion for summary judgment under Rule 56 is the more common vehicle for asserting such defenses. See *Peterson v. Jensen*, 371 F.3d 1199, 1202 (10th Cir. 2004). In asserting a qualified immunity defense in their Rule 12(b)(6) motion, Defendants have set a higher bar for themselves; "a district court should not dismiss a complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Jensen*, 371 F.3d at 1202 (internal quotations and citations omitted). In sum, asserting a defense of qualified immunity shifts the burden to the plaintiff, but doing so in the context of a 12(b)(6) motion materially lessens that burden.

ANALYSIS

I. The Fourth Amendment Claims

As an initial matter, the Court notes that the Defendant Officers attached to their motion three recordings taken from Officer Dasko's body worn camera ("BWC"). In deciding a motion under Rule 12(b)(6), the ultimate duty of the Court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007). Should the Court receive and consider materials outside the complaint, it may convert a Rule 12(b)(6) motion to a motion for summary judgment if the parties have notice of the changed status and the nonmovant responded by supplying its own extrinsic evidence. See *Alexander v. Oklahoma*, 382 *9 F.3d 1206, 1214 (10th Cir. 2004). However, a district court may consider documents referred to in the complaint that are central to a plaintiff's claim if the parties do not dispute their authenticity without converting the Rule 12(b)(6) motion into a summary judgment motion. See *Cty. of Santa Fe, N.M. v. Public Serv. Co. of N.M.*, 311 F.3d 1031, 1035 (10th Cir. 2002).

The Defendant Officers claim that Mr. Pittman's Second Amended Complaint refers to the BWC recordings and bases factual allegations on those recordings. Mr. Pittman argues that the Court should either disregard the BWC footage or convert the motion to one for summary judgment and consider the sworn declaration attached to his response.

The Court finds that the Second Amended Complaint does refer to the BWC footage as support for Mr. Pittman's claims. For instance, he alleges that "[t]he officers' lapel cameras clearly show that Mr. Pittman felt threatened, and was exhausted, scared, and humiliated throughout the process of the unlawful search and detention." Dkt. #83 at 10, ¶ 65. He also claims, in part, that the City should be liable because

[a]lthough Lieutenant Cerinich could clearly see and hear on the body camera footage that Mr. Pittman was unlawfully seized and searched based on his race and arrest record, he nevertheless determined that the actions of Officers Dasko, Burke, Veith, and Palacio involving Mr. Pittman on January 19, 2019 were lawful, and that no disciplinary action, training, or additional supervision was necessary.

Id. at 11. ¶ 71. Moreover, while Mr. Pittman asserts that "a genuine dispute of fact exists regarding the meaning of Mr. Pittman's statements on Officer Dasko's body-worn camera footage," the authenticity of the recordings is not in dispute; the footage shows what it shows. *Cf. Scott v. Harris*, 550 U.S. 372, 379 (2007) (in a case involving allegations of excessive force in connection with a high-speed chase, the Supreme Court considered the contents of a videotape "capturing the events in question" for which there were no allegations or indications of doctoring or tampering in any way). Accordingly, the Court can consider the BWC recordings without converting the motion to a summary judgment motion and having to consider Mr. Pittman's declaration. As more fully explained below, however, the BWC recordings are of little help to the Defendant Officers because they do not contradict Mr. Pittman's well-pled allegations that his constitutional rights were violated.

The Court now turns to the substance of the Defendant Officers' motion to dismiss Mr. Pittman's Fourth Amendment claims. The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . shall not be violated." U.S. Const. amend. IV. A "seizure" for the purposes of the Fourth Amendment occurs when a government actor terminates one's freedom of movement through means intentionally applied. *See Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989); *Scott*, 550 U.S. at 381. A traffic stop is a seizure for Fourth Amendment purposes. *United States v. Valenzuela*, 494 F.3d 886, 888 (10th Cir. 2007). The ultimate touchstone of the Fourth Amendment is "reasonableness." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006). The reasonableness of a routine traffic stop is assessed under the principles laid out for investigative detentions in *Terry v. Ohio*, 392 U.S. 1 (1968), considering "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *United States v. Wilson*, 96 F. App'x 640, 643 (10th Cir. 2004) (citation and quotation marks omitted). *11

"A traffic stop is justified at its inception if an officer has . . . reasonable articulable suspicion that a particular motorist has violated any of the traffic . . . regulations of the jurisdiction." *United States v. Winder*, 557 F.3d 1129, 1134 (10th Cir. 2009). The Defendant Officers argue that Mr. Pittman's challenge to the initial stop by Officers Veith and Dasko as pretextual and unsupported by reasonable suspicion is belied by the BWC footage. The Court disagrees. The recordings do show that Mr. Pittman informed Officer Dasko that he had been stopped earlier that night for a defective headlamp. However, the recordings do not show the allegedly defective headlamp, nor does Mr. Pittman admit to Officer Dasko that the headlamp was not operating properly or state that the other officer had cited him for an equipment violation. In his Second Amended Complaint, Mr.

Pittman alleges that he "was driving in full compliance with all traffic laws" and that "his headlamps were functioning properly." Dkt. #83 at 4, 5, ¶¶ 19, 24. The Court must accept these allegations as true and, construing them in the light most favorable Mr. Pittman, they are not contradicted by the BWC footage. Therefore, Claim Three should not be dismissed.

The Defendant Officers next claim that they were justified in detaining Mr. Pittman and searching person and vehicle. Again, at this stage, the Court cannot agree.

Even when a traffic stop was justified at its inception, the Court must determine whether "the resulting detention was reasonably related in scope to the circumstances that justified the stop in the first place." *Valenzuela*, 494 F.3d at 888. For purposes of constitutional analysis, a traffic stop is characterized as an investigative detention rather than a custodial arrest. See *United States v. Chavez*, 660 F.3d 1215, 1221 (10th Cir. 2011). In a routine traffic stop, an officer "may request a driver's license, vehicle *12 registration and other required papers, run necessary computer checks, and then issue any warning or citation." *United States v. Gregoire*, 425 F.3d 872, 879 (10th Cir. 2005) (citing *United States v. Rosborough*, 366 F.3d 1145, 1148 (10th Cir. 2004)). "Once those tasks are completed, a driver must be allowed to proceed on his way unless reasonable suspicion exists that the driver is engaged in criminal activity or the driver consents to additional questioning."² *Id.* See also *Winder*, 557 F.3d at 1134 ("Although an officer may effect a stop once he observes conduct that leads him 'reasonably to conclude' that criminal conduct 'may be afoot,' termination of the encounter is required once the officer's suspicion is dispelled and probable cause fails to develop.") (quoting *United States v. Peters*, 10 F.3d 1517, 1522 (10th Cir. 1993)). During a *valid* investigative detention, an officer may conduct a limited protective search ("frisk") if the officer harbors an articulable and reasonable suspicion that the person is armed and dangerous. *United States v. King*, 990 F.2d 1552, 1557 (10th Cir. 1993). Similarly, "[o]fficers can conduct a protective search of a vehicle[] . . . for weapons during an investigative detention when officers have a reasonable belief that a suspect poses a danger." *United States v. Dennison*, 410 F.3d 1203, 1210 (10th Cir. 2005). For there to be reasonable suspicion, all that is required is that "the officer . . . must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Cortez v. McCauley*, 478 F.3d 1108, 1115 (10th Cir. 2007) (en banc) (internal quotation marks omitted). The determination of reasonable suspicion "does not depend upon any one factor, but on the totality of the circumstances." *United States v. Soto*, 988 F.2d 1548, 1555 (10th Cir. 1993). The evaluation of whether an officer has a "particularized and objective basis for suspecting legal wrongdoing" is made "from the perspective of the reasonable *officer*, not the reasonable person." *United States v. Quintana-Garcia*, 343 F.3d 1266, 1270 (10th Cir. 2003) (emphasis in original) (internal quotation marks omitted).

² Mr. Pittman emphatically did not voluntarily consent to being detained or searched, so the Court focuses on whether reasonable suspicion existed. -----

According to the Defendant Officers, the time of the stop (about 2:00 a.m.), Mr. Pittman's criminal history and gang affiliation, and his refusals to cooperate must be considered when evaluating the reasonableness of their actions. They claim that officer safety justified removing Mr. Pittman from the vehicle and searching him and his car.

Considering the totality of the circumstance, the Court finds that Mr. Pittman has sufficiently alleged that the Defendant Officers lacked reasonable suspicion to prolong the stop and conduct the searches at issue. First, as discussed above, Mr. Pittman has adequately stated a claim that this was not a valid investigative detention, making any continuation or escalation of the stop also invalid. Second, Mr. Pittman alleges (and the BWC corroborates) that upon being stopped, he handed over the required documentation to Officer Dasko. Officer

Dasko ran the standard computer check and when he came back to Mr. Pittman's vehicle, he confirmed that Mr. Pittman was "code four," meaning he did not have any outstanding warrants, his car registration was valid, and he was not going to receive a citation for the allegedly defective headlight. At this point, Mr. Pittman should have been allowed to leave barring some reasonable suspicion that some other criminal activity had taken place. The Court finds the factors cited by the Officer Defendants do not amount to the necessary "reasonable, articulable suspicion" to justify their subsequent detention and search of Mr. Pittman. *14

As to his "criminal history" and gang affiliation, the Tenth Circuit has recently reiterated that "[s]tanding alone, a criminal record—let alone arrests or suspected gang affiliation—is not sufficient to create reasonable suspicion of anything." *United States v. Hammond*, 890 F.3d 901, 906-07 (10th Cir.), cert. denied, 139 S. Ct. 390 (2018) (internal quotation marks and brackets omitted). Otherwise, "any person with any sort of criminal record—or even worse, a person with arrests but no convictions—could be subjected to a *Terry*-type investigative stop by a law enforcement officer at any time[.]" *United States v. Sandoval*, 29 F.3d 537, 543 (10th Cir. 1994). "Such a rule would offend the careful balance between individual liberty and public safety that is at the heart of the Fourth Amendment." *Hammond*, 890 F.3d at 907. The Court must heed these cautions in this case for several reasons. Officer Dasko's reference to Mr. Pittman's "criminal history" is vague, he only says that Mr. Pittman had "some weapons offenses." There is no indication as to whether these were merely arrests, when they occurred, or what weapons were involved, though in his Second Amended Complaint, Mr. Pittman alleges that upon running his name through the database, Officers Dasko and Veith learned of a prior arrest from 2016. This alone is plainly insufficient. Nor was Mr. Pittman noted to be advertising any gang affiliation, actively involved in a gang feud, or in a high-crime area. Thus, unlike in *Hammond*, where officers knew the individual "was a gang member who had recently been arrested for weapons possession, that he was riding in the very car seized during his previous arrest, and that he was wearing gang colors," here, the circumstances of the stop did not "interact" with Mr. Pittman's criminal history to trigger a reasonable officer's suspicions, such that the "criminal history becomes critically relevant for *Terry*-purposes." 890 F.3d at 907. See also *United States v. Davis*, *15 94 F.3d 1465, 1468 (10th Cir. 1996) (no reasonable suspicion that an individual was engaging in criminal activity based on: (1) his car being parked outside a known criminal establishment; (2) his actions in exiting the car when he saw the officers, making and then breaking eye contact, and refusing to stop when directed; (3) his keeping his hands in his pockets; and (4) the officers' knowledge his prior criminal record).

Mr. Pittman's "refusal to cooperate" with Officer Dasko's commands to leave the vehicle and subject himself to a search has little relevance to the Court's analysis because that occurred *after* Defendant Dasko confirmed he was "code four." Moreover, the Defendant Officers cannot bootstrap Mr. Pittman's refusal to consent to a search to create a reasonable suspicion of criminal activity. "If refusal of consent were a basis for reasonable suspicion, nothing would be left of Fourth Amendment protections. A motorist who consented to a search could be searched; and a motorist who refused consent could be searched, as well." *United States v. Santos*, 403 F.3d 1120, 1126 (10th Cir. 2005). The knife found on Mr. Pittman is immaterial for similar reasons: it cannot form the *basis* for the search because it was discovered *during* the search. The Defendant Officers' claim that it was reasonable for Officer Dasko to ask Mr. Pittman to exit the vehicle so he would not have to have a "conversation" with him while standing in the road likewise fails because absent reasonable suspicion, no further conversation was necessary, or even permitted under the Constitution—the traffic stop had concluded.

Nor does the fact that the stop happened at 2:00 a.m. affect the analysis. The late hour itself does not strike the Court as remarkable. East Colfax Avenue, where the stop occurred, is a major thoroughfare that people drive on at all hours for all sorts of *16 reasons. Moreover, "there were no other facts in the totality of circumstances that

would have given the time of day probative value in the reasonable-suspicion calculus." *United States v. Archuleta*, 619 F. App'x 683, 689 (10th Cir. 2015). In *Archuleta*, the Tenth Circuit held that a driver's possession of a firearm, the fact that he was stopped at 1:25 a.m. in a "high crime area," and his criminal history were not, "either individually or in the aggregate," a proper foundation for reasonable suspicion. *Id.* at 688. The Court finds the same here. Once the officers determined that Mr. Pittman was "code four," there was no need for officer security purposes to ask him to step out of the car or do any protective search at all. At that point, the safest thing to do was the Constitutional thing to do: let Mr. Pittman go on his way. In short, Mr. Pittman has adequately alleged that he was detained and searched without reasonable suspicion.

Next, the Defendant Officers argue that Mr. Pittman has not alleged sufficient personal participation on the part of Officers Burke and Palacio. To hold a government official individually liable under § 1983, the plaintiff must establish that the defendant had personal involvement in the alleged constitutional violation. *Brown v. Montoya*, 662 F.3d 1152, 1163 (10th Cir. 2011). In other words, there must be an affirmative link between the constitutional deprivation and the defendant's personal participation. See *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009) (citing *Green v. Branson*, 108 F.3d 1296, 1302 (10th Cir. 1997)). Without an allegation of personal participation, a plaintiff does not state a claim for relief.

As the Court recognized in its earlier Report and Recommendation, the failure of a law enforcement officer to intervene in another officer's unconstitutional conduct may be sufficient to show personal participation. See 17 *Fogarty v. Gallegos*, 523 F.3d 1147, *17 1162 (10th Cir. 2008) ("An officer who fails to intervene to prevent a fellow officer's excessive use of force may be liable under § 1983."). The Tenth Circuit has held that is "clearly established"

that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence. An officer who fails to intercede is liable for the preventable harm caused by the actions of the other officers where that officer observes or has reason to know: (1) that excessive force is being used, (2) that a citizen has been unjustifiably arrested, or (3) that any constitutional violation has been committed by a law enforcement official. In order for liability to attach, there must have been a realistic opportunity to intervene to prevent the harm from occurring. Whether an officer had sufficient time to intercede or was capable of preventing the harm being caused by another officer is an issue of fact for the jury unless, considering all the evidence, a reasonable jury could not possibly conclude otherwise.

Vondrak v. City of Las Cruces, 535 F.3d 1198, 1210 (10th Cir. 2008) (quoting *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994)).

The Court first notes that the Defendant Officers' claim that Mr. Pittman alleges that "all Defendant Officers were fully aware of the alleged pretextual reason for the stop" is inaccurate. Claim Three for unlawful seizure is only asserted against Officers Veith and Dasko. See Dkt. #83 at 30. Officers Burke and Palacio are alleged to have been involved in the wrongful detention of Mr. Pittman and the search of his person and vehicle, either through direct participation or by failing to intervene. Specifically, Mr. Pittman alleges that all the Defendant Officers heard Officer Dasko tell Mr. Pittman that he was "code four." *Id.* at 7, ¶ 45. Accordingly, they were aware that any extension of the traffic stop thereafter, based only on the fact that Mr. Pittman was allegedly a known gang member with "some weapons offenses," was unlawful, and although they had the opportunity to intervene with Officer Dasko before and during his search of Mr. Pittman and the vehicle, they failed to do so. 18 *Id.* at 7-8, ¶¶ 46-49. The Court finds that these *18 allegations plausibly allege Fourth Amendment violations under the failure-to-intervene theory against Officers Burke and Palacio.

Finally, the Defendant Officers are not entitled to qualified immunity. The right not to be subjected to a traffic stop without reasonable suspicion is clearly established. *See Whren v. United States*, 517 U.S. 806, 811-12 (1996). Moreover, "[i]t is well-established that an automobile stop is subject to the Fourth Amendment imperative that guarantees the right to be free from unreasonable searches and seizures." *Lange v. City of Grand Junction*, No. 08-cv-02049-LTB, 2009 WL 1362636, at *4 (D. Colo. May 14, 2009). *See also Winder*, 557 F.3d at 1135 ("Tenth Circuit precedent is clear that unless the officer obtains a new and independent basis for suspecting the detained individual of criminal activity, his investigation must end.") (citation and quotation marks omitted). And, as noted above, the affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence is also clearly established. *Vondrak*, 535 F.3d at 1210. *See also id.*, ("[G]iven Krause's close proximity to the initial handcuffing, and his presence immediately thereafter, the district court was correct in denying qualified immunity to Krause on the excessive force claim."). Accordingly, Mr. Pittman's Fourth Amendment claims should proceed against all the Defendant Officers.

II. The Fourteenth Amendment Equal Protection Claim

Claim Five asserts a Fourteenth Amendment claim against all the Defendant Officers for violating the Equal Protection Clause. Mr. Pittman alleges that he was pulled over and unlawfully detained and searched due to his race. *19

In *Whren*, the Supreme Court held that claims asserting selective enforcement of a law on the basis of race are properly brought under the Equal Protection Clause. 517 U.S. at 813. The fundamental guarantee of the Equal Protection Clause is that "all persons similarly situated shall be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). To adequately plead an equal protection claim, Mr. Pittman must allege facts that the Defendant Officers treated him differently from others similarly situated. *Id.* "Individuals are 'similarly situated' only if they are alike 'in all relevant respects.'" *Requena v. Roberts*, 893 F.3d 1195, 1210 (10th Cir. 2018) (quoting *Coal. for Equal Rights, Inc. v. Ritter*, 517 F.3d 1195, 1199 (10th Cir. 2008)). To state a claim of racially selective law enforcement, Mr. Pittman also must demonstrate that the Defendant Officers' actions had a "discriminatory effect and were motivated by a discriminatory purpose." *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1168 (10th Cir. 2003). "The discriminatory purpose need not be the only purpose, but it must be a motivating factor in the decision." *Id.* "[T]here need not be direct evidence of discriminatory purpose; discriminatory purpose can be shown with purely circumstantial evidence." *Blackwell v. Strain*, 496 F. App'x 836, 844 (10th Cir. 2012).

At this early stage of litigation, The Court finds that Mr. Pittman has stated a Fourteenth Amendment claim against the Defendant Officers. Mr. Pittman has adequately alleged that the initial stop was racially motivated. Mr. Pittman alleges that Officers Dasko and Veith were travelling in the opposite direction when they made a U-turn and began following him. Although this would make sense if Mr. Pittman had a broken headlamp, Mr. Pittman alleges that his lights were working. Accordingly, he claims that they knew he was African American and that was the real reason they *20 began to follow him. Moreover, the officers allegedly followed Mr. Pittman for 18 blocks, only pulling him over when he was about to leave their jurisdiction. This supports an inference that the defective headlamp was not the real reason Mr. Pittman was targeted because they could have pulled him over for that immediately. Accepting these allegations as true, Mr. Pittman plausibly alleges that the decision to pull him over was pretextual. *See Marshall*, 345 F.3d at 1169 (plaintiff's testimony that he did not commit a traffic violation evidence of pretext).

Mr. Pittman also states a claim that he was detained and searched due to his race. His license, registration, and insurance were all valid. All the Defendant Officers were aware of this fact. However, rather than letting him leave, Officer Dasko demanded that he get out of the vehicle due to his gang associations. By this time, Officers Burke and Palacio knew Mr. Pittman was African American because they had arrived on scene and approached the vehicle. Mr. Pittman was physically removed from the vehicle and subjected to a pat down search. He was then made to wait for 30 minutes, surrounded by armed officers, while his vehicle was searched. Officer Dasko found no evidence of crime. Nevertheless, Mr. Pittman was cited for failing to obey a lawful order, a charge that was later dismissed. The Court cannot say that Mr. Pittman's claim that this would not happen to a non-African American driver is implausible. The right not to be subjected to racially selective law enforcement is clearly established. *Marshall*, 345 F.3d at 1167. The Court finds that that Mr. Pittman's Second Amended Complaint alleges enough discriminatory intent for his Fourteenth Amendment claim to survive a Rule 12(b)(6) dismissal effort.

IV. Claims Against the City of Aurora

21 *21

The Court will next address the City's motion to dismiss Mr. Pittman's two municipal liability claims brought pursuant to § 1983 and *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978). Mr. Pittman alleges that the City maintains a widespread, informal custom or practice of violating the Fourth and Fourteenth Amendment rights of African Americans and fails to adequately train and supervise its officers. The City argues that Mr. Pittman has failed to sufficiently allege facts to support these claims.

"To establish municipal liability under § 1983, Plaintiff must prove a constitutional violation by the individual officers. In other words, 'absent a constitutional violation by the individual police officers whose conduct directly caused plaintiffs' injuries, there can be no municipal liability.'" *Estate of Ronquillo by & through Estate of Sanchez v. City & Cty. of Denver*, 720 F. App'x 434, 441 (10th Cir. 2017) (citing *Trigalet v. City of Tulsa*, 239 F.3d 1150, 1156 (10th Cir. 2001)). As discussed above, Mr. Pittman asserts cognizable Fourth and Fourteenth Amendment claims against the Defendant Officers.

In addition to plausibly alleging that the officers committed a constitutional violation, Mr. Pittman must also allege sufficient facts to demonstrate that a municipal policy or custom was the moving force behind the constitutional deprivation. *Jiron v. City of Lakewood*, 392 F.3d 410, 419 (10th Cir. 2004). A municipal policy or custom can take the form of

- (1) a formal regulation or policy statement; (2) an informal custom amoun[ting] to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from 'deliberate indifference' to the injuries that may be caused.

22 *22 *Bryson v. City of Oklahoma City*, 627 F.3d 784, 788 (10th Cir. 2010) (citations omitted).

To establish municipal liability on the basis of custom or practice, a plaintiff must show: (1) the existence of a continuing, persistent and widespread practice of unconstitutional misconduct by the municipality's employees; (2) deliberate indifference to or tacit approval of such misconduct by the municipality's policymaking officials after notice to the officials of that particular misconduct; and (3) that the plaintiff was injured by virtue of the

unconstitutional acts pursuant to the custom and that the custom was the moving force behind the unconstitutional acts. *Gates v. Unified Sch. Dist. No. 449*, 996 F.2d 1035, 1041 (10th Cir. 1993). "In attempting to prove the existence of such a continuing, persistent and widespread custom, plaintiffs most commonly offer evidence suggesting that similarly situated individuals were mistreated by the municipality in a similar way." *Carney v. City & Cty. of Denver*, 534 F.3d 1269, 1274 (10th Cir. 2008).

A municipality's failure to adequately train, supervise, or discipline employees can also be used to establish municipal liability if "that failure results from deliberate indifference to the injuries that may be caused." *Bryson*, 627 F.3d at 788 (internal quotation marks omitted). See also *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989). This standard is met if a "municipality has actual or constructive notice that its action or failure is substantially certain to result in a constitutional violation, and it consciously and deliberately chooses to disregard the risk of harm." *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1318 (10th Cir. 2002) (internal quotation marks omitted).

The Court finds that Mr. Pittman has adequately alleged municipal liability under both theories. In other words, he has stated a claim that the City has an informal policy or custom of unlawfully searching and seizing African Americans based on their race *23 and arrest record, and that the City deliberately ignored the risk that its failure to train, supervise, or discipline its officers would result in constitutional violations. In his Second Amended Complaint, Mr. Pittman provides numerous examples where officers of the Aurora Police Department extended traffic stops of African Americans beyond their permissible scope to conduct unlawful searches based solely on the driver's race and arrest record. See Dkt. #83 at 11-27, ¶¶ 75-196. Despite the fact that in each instance, the victims made a citizen complaint with the department and then filed a federal lawsuit, Mr. Pittman alleges that the City never re-trained, disciplined, or provided additional supervision to any the officers involved. In fact, Mr. Pittman notes that Lieutenant Cerinich criticized the City Attorney's Office for dismissing the case against him. And then, in April 2019, Mr. Pittman himself was pulled over again under similar circumstances and with similar results.

One example Mr. Pittman provides, which the Court finds illustrative, involves an African American couple who were stopped by officers on East Colfax Avenue for a defective taillight. See *id.* at 14-17, ¶¶ 89-111. One of the officers was recorded saying that the male passenger's "got priors for coke, drug abuser, and gang stuff. . . So let's pull em' out [of the car], we'll pat em' down, [and] just sit em' [on the curb]. I'll ask her for consent, if she denies it either way we'll protective sweep the car, make sure there's no weapons in there and then I'll finish the summons." *Id.* at 14, ¶ 93. The couple and the car were searched and nothing illegal was found. Not only are there marked similarities between this situation and the ones described by Mr. Pittman here and in his other case, during a February 10, 2020 Rule 30(b)(6) deposition, the Deputy Chief of the Aurora Police Department testified the officer's actions were lawful and agreed that no *24 discipline, training, or additional supervision was necessary as a result of that incident. *Id.* at 36, ¶ 258.

The City argues states that while Mr. Pittman "alleges that there are ten unspecified instances of improper searches identified in the discovery of one of those cases," the Second Amended Complaint "gives no factual allegations to support this conclusion, nor does it identify any alleged conduct of officers or details that would explain the circumstances of these allegations." The Court dismisses this argument out of hand. The Second Amended Complete is replete with specific factual allegations regarding the other incidents. The Court likewise rejects the City's claim that the cases cited by Mr. Pittman are insufficient to support an inference of widespread custom because none have resulted in adjudication with liability. As then-Chief Judge Marcia S. Krieger stated in *Estate of Valverde by & through Padilla v. Dodge*, No. 16-cv-1703-MSK-MEH, 2017 WL 3530282, at *4

(D. Colo. Aug. 17, 2017), "[t]he outcome of any of the lawsuits is not relevant to the issue at hand. Taking the allegations as true, they could plausibly demonstrate the existence of an informal custom or practice that resulted in [racial profiling], and therefore the allegations are sufficient to state a *Monell* claim."

25 Additionally, Magistrate Judge Kristen L. Mix recently found that a plaintiff's list of eight prior incidents involving alleged misconduct by Aurora Police Department officers that went unpunished demonstrated that the City has "constructive notice that its failure to discipline these officers is likely to result in significant harm to the public." *Diallo v. Milligan*, No. 18-cv-02898-REB-KLM, 2019 WL 3302166, at *12 (D. Colo. July 23, 2019). This Court finds likewise. The examples provided by Mr. Pittman sufficiently *25 establish a clear and persistent pattern of deliberate indifference for Rule 12(b)(6) purposes. *See id.* at *13. And, as Judge Mix acknowledged, "[t]he Tenth Circuit has stated that 'failure to investigate or reprimand might [] cause a future violation by sending a message to officers that such behavior is tolerated.'" *Id.* (quoting *Cordova v. Aragon*, 569 F.3d 1183, 1194 (10th Cir. 2009)). The fact that the City repeatedly failed to retrain or discipline its officers for unlawful searches and seizures involving African American drivers, even in the face of the City's own attorneys' condemnation of the practice, plausibly supports the conclusion that the Defendant Officers believed their unconstitutional behavior would be tolerated. Thus, the failure to train can be considered a "moving force" behind Mr. Pittman's injuries. *See id.*

RECOMMENDATION

It is hereby **RECOMMENDED** that Defendant City of Aurora's Motion to Dismiss Plaintiff's Second Amended Complaint and Jury Demand (Dkt. #90), and the Motion to Dismiss on Behalf of Defendants Palacio, Dasko, Veith, and Burke (Dkt. #93), be **DENIED**.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(c) and Fed. R. Civ. P. 72(b)(2) , the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific

26 **objections waives *de novo* review of the *26 recommendation by the District Judge, *Thomas v. Arn* , 474 U.S. 140, 148-53 (1985), and also waives appellate review of both factual and legal questions. *Makin v. Colo. Dep't of Corrections* , 183 F.3d 1205, 1210 (10th Cir. 1999); *Talley v. Hesse* , 91 F.3d 1411, 1412-13 (10th Cir. 1996). Dated: October 23, 2020**

Denver, Colorado

/s/_____

N. Reid. Neureiter

United States Magistrate Judge